

trovetry: Constitutional Reform in Alabama, ed. Bailey Thomson (Tuscaloosa: University of Alabama Press, 2002): 101–13.

66. Don Logan, “Remedial lesson: State still failing schools,” *Birmingham News*, February 2, 2003.

67. Susan Pace Hamill, “An Argument for Tax Reform Based on Judeo-Christian Ethics,” *Alabama Law Review*, vol. 54, no. 1 (Fall 2002): 1–112; Shailagh Murray, “Divinity School Article Debates Morality of Alabama Tax-Code,” *Wall Street Journal*, February 12, 2003.

68. Interview with William O’Connor, Tuscaloosa, Alabama, November 25, 2002.

69. See, for example, Alan Erenhalt, “Big Mule Renewal,” *Governing*, July 2003, at <http://www.governing.com/archive/2003/jul/assess.txt>. Erenhalt, who has followed Alabama politics closely, concludes that eventually the state’s business leaders, often known as the Big Mules, will get what they want: an adequate and fair tax system.

70. Stewart, *The Alabama State Constitution: A Reference Guide*, 5.

71. Riley’s respected finance director, Draton Nabers, Jr., reaffirmed the reality of a \$675 million deficit for 2004 in an essay titled “State deficit no ‘far cry’ from projections.” See *Birmingham News*, September 21, 2003.

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The Mandatory Constitutional Convention Question Referendum:

The New York Experience in National Context

Gerald Benjamin

Voters in New York expressed little confidence in government; turnout at the polls was consistently abysmal. Legislative elections rarely offered real choices; incumbents almost never lost. Gridlock was the norm in a state legislature that featured the most persistent divided partisan control in the nation. The state budget had not been passed on time in thirteen years.¹ The state personnel system was sclerotic. A torturous local government web—a “system” in name only—diffused accountability and drove up costs. State and local taxes, especially local property taxes, were among the highest in the nation.² The result of all this was a state and local service delivery system that was expensive, inequitable, and often inadequate. Education is the best example. Mean per pupil education spending was very high.³ Children in the suburbs were well served, or at least had a fighting chance. But most children—especially minority children in urban centers—were simply not being educated.⁴

Yet, when asked in 1997, in the midst of these conditions, to vote on the question “Shall there be a convention to revise the constitution and amend the same?” New Yorkers responded with a resounding “No.” The vote was 929,415 in favor of a convention, to 1,579,390 against. Perhaps even more tellingly, a plurality of citizens who came to the polls in that year—1,693,788 of them—simply ignored the question entirely! The

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idea of holding a convention was rejected even though Governor Mario M. Cuomo had earlier endorsed it as the state's best chance for reform; even though the commission he appointed worked for several years to prepare for it; and even though by the time of the vote virtually every daily newspaper in the state had published an editorial in favor of holding a constitutional convention.⁵

The convention question was on the ballot in 1997 because a century-and-a-half earlier (in 1846) a Convention in New York added a constitutional requirement that the question of whether to call a convention be asked every twenty years.⁶ The idea for a mandatory convention referendum at regular intervals first appeared in the late eighteenth century in the constitutions of Massachusetts, New Hampshire, and Kentucky.⁷ The Empire State is currently one of fourteen in the United States whose constitutions require the periodic submission of such a question.⁸ Perhaps because the idea was included in the Model State Constitution, many of these states adopted the provision relatively recently: Alaska (1956), Connecticut (1965), Hawaii (1950), Illinois (1970), Michigan (1963), Missouri (1945), and Montana (1972). Additionally, Rhode Island added the periodic convention-call provision to its constitution in 1973.⁹

One rationale for such provisions is that the sovereign people should have some way of making changes in their governmental structure without having to rely on action by those in statewide and legislative offices, many of whom may be beneficiaries of a flawed status quo. Another is the Jeffersonian view that it is healthy for democracy for each generation to define anew its governing arrangements. Thomas Jefferson wrote in 1816 that "Each generation [has] . . . a right to choose for itself the form of government it believes most promotive of its own happiness. . . . [A] solemn opportunity of doing this every nineteen or twenty years should be provided by the Constitution."¹⁰ A third, more conservative reason for these provisions is that periodic convention votes are a way of actually testing public support for political reform ideas, and of simultaneously channeling political energy and "avoiding agitation."¹¹ Such referenda are more likely to confirm the status quo than to result in conventions actually being called, this view holds.

New York's failure to authorize a constitutional convention through an automatic convention question referendum is hardly unusual. In a comprehensive review published in 1970, Robert J. Martineau found that there were seventy-two votes resulting from the automatic convention referendum provisions of state constitutions between the founding of the

nation and 1969. Twenty of these (27.8%) led to the calling of conventions in five states: Michigan, Missouri, New Hampshire, New York, and Ohio. Yet more than half of these conventions—eleven of the twenty—were in New Hampshire, which until recently provided for no means other than a convention for amending the state constitution.¹²

Since 1970 there have been twenty-five additional referenda resulting from automatic call provisions. (See table 5.1.) Four produced conventions: two in New Hampshire and one each in Hawaii and Rhode Island.

TABLE 5.1
Constitutional Convention Question Referendum Outcomes
in Mandatory Referendum States, 1970–2000

<i>State</i>	<i>Year</i>	<i>Yes</i>	<i>No</i>	<i>Outcome</i>
Iowa	1970	204,517	214,663	No
Alaska	1972	29,192	55,389	No
New Hampshire	1972	96,794	73,365	Yes
Ohio	1972	1,291,267	2,142,534	No
Hawaii	1976	199,831	61,264	Yes
New York	1977	1,126,902	1,668,137	No
Iowa	1980	404,249	640,130	No
Alaska	1982	63,816	108,319	No
Missouri	1982	406,446	927,056	No
New Hampshire	1982	115,351	105,207	Yes
Rhode Island	1984	155,337	131,648	Yes
Hawaii	1986	139,236	173,977	No
Connecticut	1986	207,704	379,812	No
Illinois	1988	900,109	2,727,144	No
Maryland	1990	321,412	470,477	No
Oklahoma	1990†			Not held
Iowa	1990	179,762	491,179	No
Montana	1990	53,630	245,009	No
Alaska	1992	84,929	142,735	No
Ohio	1992	1,674,373	2,660,270	No
New Hampshire	1992	210,340	217,575	No
Michigan	1994	777,779	2,008,070	No
Rhode Island	1994	173,693	118,545	No
Hawaii	1996	164,132	123,021	No*
New York	1997	929,415	1,579,390	No
Iowa	2000	299,972	598,318	

*Majority of all those voting at the election required to call a convention.

†No vote. Legislation necessary to meet constitutional mandate never passed

Source: Obtained by the author from state boards of elections.

Thus, the success rate during the past three decades (16%) has been substantially lower than in the past. No conventions have been authorized by voters under an automatic call provision in the fourteen states since the positive outcome in Rhode Island in 1984. A 1996 referendum in Hawaii produced a supportive majority of those voting on the question, but no constitutional convention was held. Litigants who claimed that the required majority had to be of all those who voted at that election were supported in the courts.¹³

Despite the mandate in its state constitution that the question be asked every twenty years, no vote was held in Oklahoma in 1990 on whether to call a convention. Janice C. May reported that “the legislation necessary to place the referendum on the ballot did not clear the legislative process and no vote was taken.”¹⁴ Failure to provide for balloting on the question is only one of the ways state legislatures have sought to block conventions by inaction. Another is by failure to authorize the preparatory work to educate the public on the importance and meaning of the convention vote, and then arguing that in the absence of preparation a convention would be too risky.¹⁵ A third is by failure to provide for the election of delegates or for the logistical support necessary to hold a convention.

Because the New York State Constitution prescribes the precise question to be asked of the voters—“Shall there be a convention to revise the constitution or amend the same?”—the agenda of a constitutional convention in New York may not be limited.¹⁶ The situation is similar in eight other mandatory question states.¹⁷ Six mandatory convention states also allow constitutional amendment through an initiative—a more targeted method for bypassing those in power to make change.¹⁸ The availability of such an option may make the convention route to constitutional change even less attractive.

The inability to limit a convention’s agenda makes gaining the cooperation of the state legislature—termed “indispensable” by a team of political scientists who comprehensively reviewed the extensive efforts at state constitutional change in the 1960s—extremely problematic.¹⁹ Legislatures began as the dominant governmental institutions in the separation-of-powers systems of the American states. Constitutional change over more than two centuries has, in general, been a story of the diminution of the role and powers of legislatures. It is no surprise, then, as Albert Sturm noted, that legislatures, as the principal “repositories of general policy making authority,” are natural enemies of unlimited constitutional conventions.²⁰

TIMING AND ELECTION CYCLES

Predictable electoral cycles and fixed decision points are a defining characteristic of American politics. Public officials run for offices with fixed terms, usually two or four years; election day for most national, state, and even local offices is the first Tuesday after the first Monday in November. Longer cycles are defined by term limits—traditionally for statewide elected officials—but, lately in many states, for legislators as well. The convergence or divergence of these cycles affects voter turnout, ballot length, the availability of campaign resources, and a number of other factors that may impact political outcomes in a particular election year. Often, structural arrangements are made to limit or eliminate specific convergences. In thirty-five states with four-year terms for governor, gubernatorial elections are held in even-numbered years that are not presidential election years. In Virginia, New Jersey, Kentucky, Louisiana, and Mississippi gubernatorial elections are held in odd-numbered years.²¹ To cite a less-known example of structural arrangements made to limit or eliminate specific convergences, the New York State Constitution provides that city-elected officials be chosen in odd-numbered years, and that all their terms expire in odd-numbered years.²² Peter Galie writes that this was intended by Progressives in 1894 as a “home rule” provision that “separated state and national elections from municipal elections so only municipal issues would determine the outcome.”²³ Of course, it also sheltered elections for state offices from the turnout that might be stimulated in New York City and other big cities by convergent mayoral elections.

The mandatory constitutional question provision adds another long cycle to fourteen states’ political systems. There are clear effects when this cycle converges with the cycle for other elections. For example, a comparison of the numbers voting in Iowa, Alaska, and New Hampshire in presidential and nonpresidential even-numbered years—three states whose cycles result in periodic referenda in both—confirms the common-sense expectation that convergence with relatively high-turnout elections result in higher numbers of citizens voting on the mandatory constitution question. (See table 5.1.)

As the prime players, incumbents in state elective offices are keenly aware of the potential that a constitutional convention could change the fundamentals of state politics and government. These office holders are, therefore, among the most attentive to the prospect of holding a convention. But additionally, the long cycle created by the mandatory question

is most likely to command their attention when it places the vote on the convention question in their own reelection context. When reelection and convention question cycles converge on the same election day, candidates for reelection may be affected by the question's presence on the ballot. Moreover, when such a convergence occurs, the incumbent is more likely to be required to pay attention while campaigning to the question of constitutional change, and therefore to take a position on the need for a convention. This is important because a key technique used by opponents of conventions in mandatory referendum states is "passive aggression." That is, by failing to prepare for and otherwise ignoring the prospect of a convention, incumbents seek to deny it visibility and to make calling it seem more risky.

The state constitution may pay specific attention to the convergence of election cycles in considering when to ask the mandatory convention question. For example, the Connecticut Constitution provides that the mandatory question appear on the ballot in an even-numbered year, assuring its convergence with a presidential or gubernatorial election and all state legislative races.²⁴ The New York Constitution does not do this. In fact, New York's mandatory convention question was the only one offered in the last three decades that was voted on in an odd-numbered year. (See table 5.1.) No statewide-elected officials or candidates for state legislature were on the ballot when New Yorkers were asked to vote on whether or not to hold a convention in 1997, and there was no presidential election to stimulate voter turnout. Conditions therefore were optimal for incumbents to minimize their attention to the convention question, if they chose to do so. In the highly disciplined majority parties in both of New York's legislative houses, passive aggression to the idea of a convention was a clear strategy. With few exceptions, the only overt legislative advocates for calling a convention were in the partisan minorities of each house—Democrats in the Senate, Republicans in the Assembly—the victims of a bipartisan gerrymander that had continuously denied them (and their predecessors) power for decades.

It is true that the predictability of the time of the question's appearance on the ballot does offer an opportunity for potential advocates of constitutional reform. It is best for such advocates if they happen to be a candidate for governor or an incumbent governor. In New York, Governor Mario Cuomo was such an advocate. Cuomo was a third-term incumbent likely to seek reelection. A former professor of law, the gover-

nor had previously asked the legislature to place a convention question on the ballot to address his reform agenda for state government.²⁵ Knowing that there certainly would be a convention referendum vote in November 1997, he enlisted the help of the State University of New York's Rockefeller Institute in planning for a convention, after a researcher there published an essay on the potential of a convention for resolving persistent problems of governance in New York.²⁶ In the Spring of 1993, Governor Cuomo appointed a Constitutional Revision Commission to prepare the groundwork and give visibility to the issue.²⁷

But the lack of convergence between the electoral cycles made the timing problematic. The mandatory provision in New York brought the convention question to the voters three years after Cuomo's bid for a fourth term, and a year before the end of that term, detaching it from the focal point of statewide politics. Cuomo apparently acted in the year prior to his likely third reelection bid in 1994 to dramatize the potential for reform through a convention. But an event almost five years in the future—light years in political time, as the Commission's first chairman Peter Goldmark described it—had little hope of gaining serious attention in the election. In fact, in 1994, Cuomo himself became the key issue. Opponents appealed for votes for George Pataki, Cuomo's Republican opponent, simply on the basis that Pataki was not Cuomo. The governor's advocacy of a convention during the campaign, when discussed at all, was dismissed by adversaries as an effort to shift responsibility for the state's problems during his tenure to the legislature.²⁸

Pataki had built his political career in the legislature. As a minority party Assemblyman he had advocated serious structural changes in state government, but he was noncommittal on the convention question as a gubernatorial candidate—the vote was far off, there was no real pressure to take a position, and its advocacy would not be popular with the Republican majority in the State Senate. When Cuomo was defeated, the main advocate for a convention was lost to the state's political system. Also, and less obviously, the convention idea remained identified with him at a time when a newly elected Republican government was seeking to define itself in stark contrast to the outgoing governor and his record. Pataki promised in his campaign to reduce the number of state departments and agencies. When he received the Constitution Commission's report it gained the distinction of becoming the first state agency to become defunct during his governorship.³⁰

It is instructive to contrast the situation in New York in 1997 with that in 1965. Standards and methods for districting the New York State Assembly and Senate—favoring upstate Republicans—were entrenched in the state constitution of 1894 and were a persistent issue in state politics thereafter. Applying the one-man/one-vote principle in *WMCA, Inc. v. Lomenzo*, the U.S. Supreme Court in June 1964 found the apportionment of the state legislature unconstitutional. A complex swirl of litigation and political maneuvering followed. Democrats captured control of both legislative houses in 1964 (the Johnson landslide year), and in 1965 passed a bill, the Travia-Zaretzki Bill, calling for a constitutional convention to address the reapportionment question. Somewhat surprisingly, Governor Nelson Rockefeller—a Republican—signed the bill.³¹ Thus, the convention question was put on the ballot in 1965. A gubernatorial election was scheduled for the next year. Rockefeller, seeking his third term, was at the nadir of his popularity. In modern New York politics, Democrats from outside the New York City metropolitan area are not nominated for governor. Howard Samuels, a wealthy upstate Democratic businessman with gubernatorial aspirations, saw that a campaign in support of a convention was an opportunity to establish his political reputation and break through this geographic barrier. Using his own money, he organized a Citizens Committee for a Constitutional Convention and led the effort for a “yes” vote to the constitutional question.³² The campaign was successful and a convention was called. Samuels’s political bona fides were established. In the end, however, he was not nominated for governor, and Rockefeller once again prevailed in the general election.

This story holds two points. First, a convention was called because of an immediate compelling political need in the legislature. A national-level decision had upset the political status quo in the state. Notwithstanding its disabilities from a legislator point of view, a convention was a potential remedy for a life-or-death political problem. It was a state, not national, process, and thus more subject to influence from the state legislature than from the federal courts. A convention also provided an opportunity for Democrats—in a rare moment of legislative dominance—to undo a Republican advantage in the state legislature that had been in place for the entire twentieth century. In addition, the electoral cycles were nearing convergence. With a gubernatorial election in the offing, a statewide campaign for reform through constitutional change provided an attractive opportunity for an ambitious politician to establish himself.

COMMISSION AND STAFF

In 1993, Governor Cuomo appointed an eighteen-person Constitutional Revision Commission made up of New Yorkers of some prominence and balanced in all the usual ways: partisanship, race, ethnicity, gender, geography, organizational base, ideology, and profession.³³ The chair was Peter C. Goldmark, Jr., then the head of the Rockefeller Foundation. Goldmark had been State Budget Director under Governor Hugh Carey, and later served as the executive director of the Port Authority of New York and New Jersey. As State Budget Director, he worked with Governor Carey to successfully bring the state through its fiscal crisis in the mid-1970s.

Commissioners were not selected merely because they had a commitment to the constitution convention idea. Some, like former Republican Governor Malcolm Wilson, were thoroughly familiar with the state constitution, deeply experienced in state government, and convinced that a convention was needed. Others, like former hostage Terry Anderson, knew little about state government or the state constitution, and learned about the convention's potential simultaneously with receiving inquiries about their possible interest in being appointed. Notwithstanding its balanced membership and the assurances the governor gave Goldmark that his inquiries could go freely wherever they took him, the commission was very much seen as Cuomo's. The legislature took no role in the appointment process, another example of its strategy of passive aggression.³⁴ The loyalty of Republicans appointed by a Democratic governor—even former Governor Wilson—were somewhat suspect in GOP party councils.

In this context, with a modest budget from the governor's discretionary funds and no legislative appropriation, Goldmark's tasks were to build a staff, knit the group together, bring all commissioners to a reasonable level of information on the issues, lead the commission in developing an agenda, and bring the convention question to the public. The three key staffers he chose had experience serving the Commission that had successfully developed the new charter that New York City adopted in 1989.³⁵ Early meetings were devoted to creating a working relationship among the commissioners, launching a research program, and establishing a network of relationships with interested constituencies throughout the state.